89- 1654

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA

PETITIONER,

V.

DOUGLAS FREEMAN

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

QUESTIONS PRESENTED

1. Where a visitor voluntarily entering a prison is subjected to a search, which is reasonable within the meaning of the Fourth Amendment and such search does not go beyond the minimum intrusion necessitated by the purposes of the search, is such search rendered violative of the Fourth Amendment solely by reason of a presumed violation of an administrative rule on which the visitor did not rely?

2. Where a person is given notice that he will be subject to a search on entering a prison and, armed with such knowledge, voluntarily visits the prison and cooperates with the prison officials in the conducting of such search, does such person consent, within the meaning of the Fourth Amendment, to such search of his person?

3. Should this Honorable Court grant the writ in this case to examine the application of the Fourth Amendment to prison visitor searches?

THE PARTIES

The parties in all of the lower courts were the same as those in this proceeding, the same being set out in the caption.

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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER,

V.

DOUGLAS FREEMAN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OPINIONS AND ORDERS BELOW

The order and opinion of the Circuit Court of Montgomery County, Alabama, entered on May 26, 1989, granting the Respondent's motion to suppress certain evidence, is not and will not be reported. The same is set out at pages 90-92 of the record and is submitted as Appendix "A" to this petition.

The order of the Court of Criminal Appeals of Alabama, entered September 29, 1989, affirming, without opinion, the order of the Circuit Court is reported as follows:

> State v. Douglas Freeman, 3 Div. 247, 553 So.2d 145, 5th case, (Ala. Crim. App, 1989)

A copy of the Court of Appeals' notice of such order is submitted herewith in Appendix "B".

The order of the Court of Criminal Appeals of Alabama, entered November 17, 1989, without opinion, denying the State's application for rehearing and request for the finding of facts is reported as follows:

> State v. Douglas Freeman, 3 Div. 247, 555 So.2d 1206, 25th case, (Ala. Crim. App, 1989)

A copy of the notice of such order is submitted herewith in Appendix "B".

The order of the Court of Criminal Appeals of Alabama, entered September 29, 1989, affirming, without opinion, the order of the Circuit Court is reported as follows:

> State v. Douglas Freeman, 3 Div. 247, 553 So.2d 145, 5th case, (Ala. Crim. App, 1989)

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The order of the Court of Criminal Appeals of Alabama, entered November 17, 1989, without opinion, denying the State's application for rehearing and request for the finding of facts is reported as follows:

> State v. Douglas Freeman, 3 Div. 247, 555 So.2d 1206, 25th case, (Ala. Crim. App, 1989)

A copy of the notice of such order is submitted herewith in Appendix "B".

The order of the Supreme Court of Alabama, entered January 26, 1990, denying, without opinion, the State's petition for a writ of certiorari is not yet reported but will be reported as:

> Ex parte State; In re: State v. Freeman, S.C. No. 89-256, ___ So.2d ___ (Ala, 1990)

A copy of the Certificate of said judgment is submitted herewith as Appendix "C".

JURISDICTION

The order of the Supreme Court of Alabama was issued on January 26, 1990, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Circuit Court of Montgomery County, Alabama, believed that its decision was mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. Respondent Freeman is indicted under Section 13A-10-37, Code of Alabama, 1975, which is set out in Appendix "D" to this Petition.

STATEMENT OF THE CASE

The Respondent, Douglas Freeman, was indicted in the Circuit Court of Montgomery County, Alabama, for promoting prison contraband in the second degree contrary to Section 13A-10-37(a)(1), Code of Alabama, 1975. (Appendix "D") The Respondent waived arraignment and pleaded not guilty. (R.pp. 81-83)

On February 19, 1988, the Respondent filed a motion to suppress the evidence found on his person incident an administrative search on his entering Kilby Correctional Facility, a prison, to visit a prisoner. (R.pp. 84-85) Ground 7 of the motion recited:

> "7. That the constitutional rights guaranteed to the defendant, both under the Constitution of the United States of America and the

> Constitution of the State of Alabama, against reasonable search and seizures have been violated." (R.p. 84; emphasis supplied)

After a hearing, Honorable Howard Bryan, III, a Circuit Judge, ordered the suppression of the evidence. (R.pp. 90-92; Appendix "A") Judge Bryan expressly found that the Respondent had entered the prison in the face of several signs giving notice that visitors would be searched upon entry,[1] but His Honor did not otherwise address the issue of consent. (R.p. 90; Appendix "A") His Honor also found that, while prison rules had previously called for the search of all visitors, prior to the

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1. "...It is without dispute that there are several signs posted about the prison which state that visitors are subject to search...." (R.p. 90; Appendix "A", p. 40)

very day of this incident, December 2, 1987, the rules had not been consistently followed with regard to lawyers. However on December 2, 1987, the Warden of Kilby Correctional Facility promulgated a memorandum directing that visiting lawyers would be searched like other persons. (R.pp. 90-92; Appendix "A", pp. 40-41) However, His Honor did not appear to attach any significance to this coincidence. Judge Bryan's key findings and conclusions were as follows:

> "...Mr. Freeman was searched in the following manner. He was taken into the men's restroom by Officer Claude Perkins. Once in the restroom Officer Perkins took Mr. Freeman's overcoat and searched the pockets. He then took Mr. Freeman's sport coat and searched the pockets. In the bottom of the left breast pocket he found a half marijuana cigarette which he turned

over to Lt. Taylor. Officer Perkins completed the search by asking Mr. Freeman to empty his pants pockets. No other contraband was found. Counsel for Mr. Freeman argued that the fruits of the above search should be suppressed.

"It is clear beyond peradventure that penal facilities have a vital interest in prohibiting the introduction of contraband into the general prison population. For that reason the Court is satisfied that jails and prisons may adopt reasonable rules regarding searches of visitors. Since routine searches without probable cause or even reasonable suspicion fly in the face of Fourth Amendment protection, they must be limited to the least intrusive means possible. The Court is not prepared to say that a regulation requiring a person to empty his pockets in the presence of a security person coupled with a pat down search would be unreasonable. However, in this case Kilby Correctional Facility chose the method of search by way

> of the memo from Warden Harrelson. Therefore, since Fourth Amendment rights were abridged by the regulation, the regulation should be strictly enforced. In this case security personnel went beyond the scope of the penitentiary regulation without an articuable reason to do so...
>
> "It is, therefore, ORDERED, ADJUDGED and DECREED that the evidence seized pursuant to the above-described search is hereby suppressed...." (R.pp. 90-92; Appendix "A", pp. 41-43)

Judgment against the State was entered on May 26, 1989, (R.p. 94) and on May 30, 1989, the State gave notice of appeal. (R.p. 93) In accordance with Rule 17(a), A.R.Crim.P.(T),

(Appendix "E")[2] The District Attorney made the following certification:

> "...I certify that this appeal is not taken for the purpose of delay and that the pre-trial order appealed from, if not reversed on appeal, will be fatal to the prosecution of the charge as to which this appeal is taken...." (R.p. 93)

---

2. "RULE 17. PRE-TRIAL APPEALS BY THE STATE

"(a) Generally. An appeal may be taken by the state in a felony case to the court of criminal appeals from a pre-trial order of the circuit court (1) suppressing a confession or admission or other evidence... Such an appeal may be taken only if the district attorney certifies to the court of criminal appeals that the appeal is not brought for the purpose of delay and that the order, if not reversed on appeal, will be fatal to the prosecution of the charge...."

If the Trial Court's order is ultimately upheld, the Respondent will be finally discharged under the indictment.[3]

On appeal to the Court of Criminal Appeals of Alabama and certiorari to the Supreme Court of Alabama, the State argued: (A) The only evidence on the subject in this record indicated that the correctional officers had followed the warden's memorandum; (B) The ruling of the Trial Court was in sharp conflict with United States v. Caceres (440 U.S. 741, 59 L.Ed.2d 733, 99 S.Ct. 1465 [1979]), and (C) with the United States Supreme Court's rulings on consent searches.

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3. "(h) EFFECT OF RULING IN PRE-TRIAL APPEAL. If the trial court's ruing is upheld following a pre-trial appeal taken pursuant to this rule, then that affirmance shall operate as a bar to any further prosecution of the defendant...." (Rule 17, A.R.Crim.P[T]; Appendix "E")

On September 9, 1989, the Court of Criminal Appeals of Alabama affirmed the Trial Court's order without opinion. (State v. Freeman, 3 Div. 247, 553 So.2d 145 [Ala. Crim. App, 1989]; Appendix "B", pp.47-48) The State applied for rehearing, which was denied without opinion on November 17, 1989. (State v. Freeman, 3 Div. 247, 555 So.2d 1206 [Ala. Crim. App, 1989]; Appendix "B", pp. 49-50) The State petitioned the Alabama Supreme Court for a writ of certiorari, which was denied on January 26, 1990, without opinion. (Ex parte State, ___ So.2d ___ [Ala, 1990]; Appendix "C")

STATEMENT OF THE FACTS

As it did in the state courts, the Petitioner State accepts the findings of fact of the Honorable Trial

Judge, with the following additions, which are not inconsistent with His Honor's findings, are shown by unconflicting evidence and were requested as findings on rehearing in the Court of Appeals:

The Petitioner testified in his own behalf. He stated that his purpose in going to the prison was to meet a prospective client, whom he had been advised might want to retain him. (R.p. 69) The Petitioner stated that he had not previously been searched at the Kilby facility, but he did not indicate that the search of his person surprised him. He acknowledged that when he had visited one Alabama Prison he had been required to empty his pockets. (R.pp. 66-67) Before being taken to the restroom for the search, he heard a female correctional officer

say "shake that lawyer down", and it was then that Correctional Officer Perkins approached him and said, "Come with me." (R.pp. 67-68) He is familiar with police terminology, and "shake down" indicated to him a more thorough search than a "pat down". (R.p. 71)

At no point in his testimony did the Petitioner indicate that he ever entertained an intention of leaving before the contraband was discovered. Indeed, there did not appear to be any reason why he would entertain such an intention, since he was there to see a potential client, he recognized that the possibility of such searches are part of visits to prison, and the Petitioner claimed that he was not aware of the presence of the contraband. (R.pp. 70-71)

At no point in his testimony did the Petitioner claim that he was aware of or relied on the Warden's memorandum. (R.pp. 63-72)

SUMMARY OF THE ARGUMENT

1. This case is properly before this Honorable Court, since, in the only opinion issued by the State Courts, the Trial Judge expressly based his opinion on the Fourth Amendment to the U.S. Constitution. In light of Rule 17(h), A.R.Crim.P.(T) (Appendix "E"), the judgment is final.

2. The Trial Judge was clearly correct in finding that the search of the Respondent was reasonable under the Fourth Amendment.

3. The Trial Judge was clearly in error in holding that the search of the Respondent was rendered violative

of the Fourth Amendment by reason of the presumed violation of the warden's memorandum. United States v. Caceres, 440 U.S. 741, 59 L.Ed.2d 733, 99 S.Ct. 1465 (1979).

4. The Trial Judge was clearly in error in ignoring the obvious consent, which the Respondent gave to this prison entry search. E.g. Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973).

5. This Court should review this case, not only because it conforms to the considerations set out in Rule 10.1(c) of this Court's Rules, but also, because this case provides this Court with the opportunity to examine a very common Fourth Amendment application in a case which, although it involves all of the matters which

usually arise in such situations, is remarkably free of collateral issues, and factual disputes, and is based on a very thorough but brief record.

ARGUMENT

I.

THIS CASE IS PROPERLY BEFORE THIS HONORABLE COURT AND IS RIPE FOR CERTIORARI REVIEW.

Obviously, this Honorable Court has jurisdiction to review applications of the Fourth Amendment to the United States Constitution. Such an application is clearly at issue here. The Respondent invoked the Fourth Amendment in his motion to suppress, and, in the only opinion issued by the Alabama Courts, the Learned Trial Judge expressly relied on the Fourth Amendment in reaching his conclusion.

The question of whether the search violated the warden's memorandum is not at issue here. Rather, in this Court, this state law ruling is a given, and the issue is: Notwithstanding the violation of the warden's memorandum, was this search reasonable within the meaning of the United States Constitution.

This case presents for review a final ruling within the meaning of 28 U.S.C. 1257, since under state law (Rule 17(h), A.R.CrimP[T]; Appendix "E") the Respondent stands discharged under the indictment, unless this Honorable Court reverses the rulings of the state courts.

Therefore, this case is properly before this Honorable Court.

II.

THE CONSTITUTIONALITY VEL NON OF THE SEARCH UNDER THE FOURTH AMENDMENT (REASON FOR GRANTING THE WRIT: NOVEL QUESTION)

This Honorable Court has never had an occasion to address the question of prison visitor searches, under the Fourth Amendment, in ordinary circumstances. This case, therefore, presents a novel question. But, the Learned Trial Judge, in the only opinion issued by the State Courts, ruled in favor of the Petitioner State on this point. However, the correctness of this ruling by the Learned Trial Judge lies at the very foundation of the Petitioner State's primary claim in this Court. It is, therefore, necessary for us to address the correctness of this ruling of the Trial Judge, since, if this ruling is

incorrect, His Honor's decision to suppress the evidence may be correct, albeit for the wrong reason.

While, as noted, this Honorable Court has never had the opportunity to examine the issue of the permissible extent of a prison visitor search, under ordinary circumstances, this Court has often recognized the obvious need for security in prisons. E.g. Thornburgh v. Abbott, 490 U.S. ___, 104 L.Ed.2d 459, 109 S.Ct. 1874 (1989). In addition, this Honorable Court has recognized that the demands of prison security diminish Fourth Amendment rights within the prison context, compared with those enjoyed in the free world. Hudson v. Palmer, 468 U.S. 517, 526-527, 82 L.Ed.2d 393, 403, 104 S.Ct. 3194 (1984); Block v. Rutherford, 468 U.S. 572, 589 ff, 82 L.Ed.2d 438, 449,

What are the Fourth Amendment limits to such searches? Much material which visitors could bring into a prison is, by reason of its nature and size, immune to scanning devices and "pat downs", which could easily discover guns, knives or explosive devices. A razor blade, for example, would pose little danger in the "free world", but could be a serious threat in the close confines of a prison, and a razor blade could be hidden in a wallet or a checkbook.[5] Similarly, small quantities of controlled substances, such as that discovered in this search would easily be missed in a frisk and go undetected by scanning devices.

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5. Both the Respondent's wallet and checkbook were examined by the correctional officers in this case. (R.p. 69)

Professor Wayne R. LaFave describes the sort of search which would be reasonable under the Fourth Amendment in these words:

> "...Generally, ... it seems fair to say that prison and jail authorities may 'require a pat-down search, removal of outer clothing, the emptying of pockets, screening by a metal detection device or other device which does not require disrobing, and the inspection of papers, bags, books or other items carried into' the institution...." (LaFave, Search and Seizure, Second Edition, Vol. 4, Section 10.7[b]; emphasis added.)

Notice that the Professor's words precisely describe the search of the Respondent undertaken by the correctional officers in this case.

Perhaps the strongest argument for the constitutional propriety of this search is necessity. As we point out in the previous paragraph, any search less thorough than that

undertaken in this case could not possibly serve the purpose intended.

The Learned Trial Judge found the search constitutional, and in this His Honor was certainly correct.

III.

THE VIOLATION OF THE WARDEN'S MEMORANDUM (REASONS FOR GRANTING THE WRIT: CONFLICT WITH THIS COURT'S OPINIONS).

His Honor fell into error, under the authorities of this Honorable Court, when, having found the prison entry search of the Respondent valid under the Fourth Amendment, he ruled that the search became violative of the same Amendment when it went beyond the

search directed by the warden's memorandum.[6]

In United States v. Caceres (440 U.S. 741, 59 L.Ed.2d 733, 99 S.Ct. 1465 [1979]), this Honorable Court ruled that, unless an administrative rule is mandated by the Constitution or federal law (Caceres, 404 U.S. 741, 749 ff, 59 L.Ed.2d 733, 742), a violation of the rule does not render a constitionally proper action unconstitutional. See also United States v. Choate (Choate II), 576 F.2d 165 (9th Cir, 1978) cert. den. 439 U.S. 953, 58 L.Ed.2d 344, 99 S.Ct. 350; United States v. Nuth, 605 F.2d 229, 233 ff (6th Cir, 1979); United States v. Valencia, note 28, 609 F.2d 603, 636- 637 (2nd Cir, 1979),

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6. The warden's memorandum used the term "pat search", which His Honor apparently read as "pat down".

cert. den. sub nom, Prado v. United States, 446 U.S. 940, 64 L.Ed.2d 795, 100 S.Ct. 2163; United States v. Choate (Choate III), 619 F.2d 21, 22-23 (9th Cir, 1980), cert. den. 449 U.S. 951, 66 L.Ed.2d 214, 101 S.Ct. 354; United States v. Irvine, 699 F.2d 43, 46 (1st Cir, 1983). The Warden's memorandum in this case is certainly not mandated by any law. On its face it is simply a rule requiring the search of all persons entering the facility.

Some courts have suggested that some relief might be due a subject who acts with reasonable reliance on an administrative rule. However, this is not at issue in this case, since the Respondent has never claimed that he relied on the Warden's memorandum, or even knew about it.

It is abundantly clear that the Alabama Courts applied the Fourth Amendment in this case in a manner which is in sharp conflict with the authoritative teachings of this Honorable Court. For this reason the writ should issue.

IV.

CONSENT

(REASON FOR GRANTING THE WRIT: CONFLICT WITH THIS COURT'S OPINIONS).

The facts in this case clearly show consent to the search by the Respondent. The Respondent knew from experience that prison entry searches were a possibility and, indeed, common sense would suggest such a possibility. As the Supreme Court of Florida observed:

> "...It is doubtful that most visitors to a prison

> have any subjective expectation that they will not be searched for weapons or other contraband. It should be obvious to any reasonable person that for the protection of both the guards and the inmates, as well as any visitors, prison personnel must do whatever is necessary to prevent the introduction of contraband into the prison. As acknowledged by the Supreme Court of the United States in Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), 'A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.' ...." (Wells v. State, 402 So.2d 402, 404 [Fla, 1981])

In addition, on his way into the prison the Respondent passed under signs warning that persons entering the facility were subject to search. On presenting himself for admittance, the

Respondent was told that he would have to be searched. He then waited patiently until he could be searched. He cooperated fully with the search. Although he testified at the hearing that he did not feel that he had the perogative to leave (R.p. 68), the Respondent did not attribute this subjective feeling to any action by the correctional officers[7] nor did he even communicate it to these officers.

These facts clearly demonstrate consent. Yet, the Learned Trial Judge

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7. "...The flaw in respondent's constitutional argument is that it would expand our previous line of 'voluntariness' cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision...." (Colorado v. Connelly, 474 U.S. 157, 165-166, 93 L.Ed.2d 473, 483, 107 S.Ct. 515 [1986])

did not even address consent in his opinion, and the Appellate Courts did not issue any opinion. Alabama law recognizes consent searches as lawful under both the State and Federal Constitution. E.g. Payton v. State, 47 Ala. App. 347, 254 So.2d 351 (1971); Ballard v. State, 461 So.2d 894, 903-904 (Ala. Crim. App. 1984); cert. den. In any event, the Trial Judge expressly based his decision on the Fourth Amendment to the United States Constitution, and consent searches are clearly reasonable under that Great Provision. Zapp v. United States, 328 U.S. 624, 630, 90 L.Ed.2d 1477, 1482-1483, 66 S.Ct. 1277 (1946); United States v. Matlock, 415 U.S. 164, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974).

Since the Appellant was not in custody or even under restraint, he did

not have the right to be advised of his right to withhold or withdraw consent. Schneckloth v. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). Compare Berkemer v. McCarty (468 U.S. 420, 435 ff, 82 L.Ed.2d 317, 331 ff, 104 S.Ct. 3138 [1984]), holding that Miranda v. Arizona (384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 [1966]) does not apply to non-custodial arrests. The Appellant's uncommunicated subjective feeling is irrelevant to the inquiry, since it was not induced by police action. Compare Colorado v. Connelly[8], above.

It is obvious that the decisions of the Alabama Courts are irreconciable

---

8. "...We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment...." (479 U.S. 157, 167, 93 L.Ed.2d 473, 484)

with the authoritative opinions of this Honorable Court. For this reason, the writ should issue.

V.

SPECIAL REASONS WHY THE WRIT SHOULD ISSUE IN THIS CASE.

Obviously, this Honorable Court has jurisdiction over this case, and at least two of the considerations for issuing the writ, as set out in Rule 10.1(c) of the Rules of this Honorable Court, are here present, but, should this Honorable Court grant review? We respectfully submit that it should for the following reasons:

1. This case present a very common situation implicating the Fourth Amendment, which this Honorable Court has never had occasion to examine. Every time a visitor enters a

correctional facility a search, at least as thorough as this one, is possible. There is a need to know if such searches conform to the Constitution.

2. The instant case is an especially useful occasion to examine such searches because:

a. This case presents the ordinary situation. There are no special circumstances to confuse the issues.

b. This case, although simple, presents all of the major questions which arise in all such situations, i.e. the visitor's right to privacy, the prison's need for security and the impact of consent and prison rules on the propriety of prison visitor searches.

c. There are no factual issues which need be resolved.

d. The record in this case, although thorough, is only 95 pages.

We, therefore, respectfully submit that this case provides this Honorable Court with a unique opportunity to review an important matter in a very simple and clear context. For this reason, we respectfully submit that the writ should issue.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided two questions under the Fourth Amendment in a manner which

conflicts sharply with the teachings of this Honorable Court.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions of the said Appellate Courts of Alabama.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE PETITIONER

APPENDIX

APPENDIX A

ORDER OF THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
(R.pp. 90-92)

90
(Stamp: May 26, 1989
FILED
DEBRA P. HACKETT
CIRCUIT CLERK)

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
vs.	)	CASE NO. CC-88-294
	)	
DOUGLAS FREEMAN,	)	
	)	
Defendant	)	

ORDER

On December 2, 1987, Douglas Freeman, a practicing attorney, went to Kilby Correctional Facility for the purpose of interviewing a prospective client. After gaining admittance to Kilby, the warden's secretary instructed one of the security persons to either "search" or "shakedown" Mr. Freeman. Pursuant to those

instructions and to a memo concerning searches, Mr. Freeman was searched. It is without dispute that there are several signs posted about the prison which state that visitors are subject to search. Mr. Freeman, in a statement to Department of Corrections investigators, said that he had never been searched before that day. Another attorney testified that he had never been searched prior to December 2, 1987, and it was stipulated and agreed that other attorneys would testify that they had not been searched prior to December 2, 1987. Coincidentally, on December 2, 1987, Warden E. L. Harrelson, had distributed and posted a memo concerning "SHAKEDOWN PROCEDURES FOR EVERYONE ENTERING KCF" The following portion of that memo is pertinent to this case:

> ["]The following persons WILL BE searched EVERY time they enter KCF by a security officer; ["] (Pat searches)
>
> ["]1. Attorneys and their brief cases will be inspected....["]
>
> (Emphasis theirs)

Mr. Freeman was searched in the following manner. He was taken into the men's restroom by Officer Claude Perkins. Once in the restroom Officer Perkins took Mr. Freeman's overcoat and searched the pockets. He then took Mr. Freeman's sport coat and searched the pockets. In the bottom of the left breast pocket he found a half marijuana cigarette which he turned over to Lt. Taylor. Officer Perkins completed the search by asking Mr. Freeman to empty his pants pockets. No other contraband was found. Counsel for Mr. Freeman

argued that the fruits of the above search should be suppressed.

It is clear beyond peradventure that penal facilities have a vital interest in prohibiting the introduction of contraband into the general prison population. For that reason the Court is satisfied that jails and prisons may adopt reasonable rules regarding searches of visitors. Since routine searches without probable cause or even reasonable suspicion fly in the face of Fourth Amendment protection, they must be limited to the least intrusive means possible. The Court is not prepared to say that a regulation requiring a person to empty his pockets in the presence of a security person coupled with a pat down search would be unreasonable. However, in this case Kilby Correctional

Facility chose the method of search by way of the memo from Warden Harrelson. Therefore, since Fourth Amendment rights were abridged by the regulation, the regulation should be strictly enforced. In this case security personnel went beyond the scope of the penitentiary regulation without an articuable reason to do so. The Court is of the opinion that Mr. Freeman's failure to sign the sign-in sheet and his pacing while waiting to see a prospective client do not rise to the level of reasonable suspicion.

It is, therefore, ORDERED, ADJUDGED and DECREED that the evidence seized pursuant to the above-described search is hereby suppressed.

A copy of this Order shall be sent by the Clerk to counsel of record and to the District Attorney.

DONE this 19 day of May, 1989.

/s/Howard F. Bryan
Circuit Judge

APPENDIX B

ORDERS OF THE COURT OF
CRIMINAL APPEALS OF ALABAMA.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

P. O. Box 351

MONTGOMERY 36101

August 15, 1989

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205)261-4590

3 Div. 247 Montgomery Circuit Court

STATE OF vs. DOUGLAS FREEMAN

ALABAMA

Appellant Appellee

Dear Sir:

You are hereby notified that on August 15, 1989, the following indicated action was taken in the

above-styled cause by the Court of Criminal Appeals of Alabama:

* * *

MOTION BY APPELLEE TO DISMISS IS HEREBY DENIED, APPEAL HAS BEEN SUBMITTED ON BRIEFS ON THIS DATE.

/s/Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

P. O. Box 351

MONTGOMERY 36101

August 15, 1989

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205)261-4590

3rd Div.247 Montgomery Circuit Court

STATE OF vs. DOUGLAS FREEMAN

ALABAMA

Appellant Appellee

Dear Sir:

You are hereby notified that on September 29, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

* * * *

AFFIRMED on appeal. NO OPINION.

Judgment not final, see Rules 40 and 41 A.R.A.P.

* * * *

/s/Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

P. O. Box 351

MONTGOMERY 36101

August 15, 1989

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205)261-4590

3rd Div.247 Montgomery Circuit Court

STATE OF vs. DOUGLAS FREEMAN

ALABAMA

Appellant Appellee

Dear Sir:

You are hereby notified that on November 17, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

* * * *

Application for rehearing OVERRULED.

Rule 39(k), A.R.A.P., motion DENIED.

NO OPINION. Judgment not final, see Rules 39 and 41, A.R.A.P.

* * * *

/s/Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX C

ORDER OF THE ALABAMA SUPREME COURT

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

January 26, 1990

89-256

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: State of Alabama v. Douglas Freeman)

(cc 3/247 Montgomery CC 88-294)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. - Hornsby, CJ., Jones, Houston and Kennedy, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 26 day of Jan 1990.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

RELEVANT ALABAMA STATUTES

CODE OF ALABAMA, 1975

TITLE 13A

§ 13A-10-37. PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE.

(a) A person is guilty of promoting prison contraband in the second degree if:

(1) He intentionally and unlawfully introduces within a detention facility, or provides an inmate with, any narcotic, dangerous drug or controlled substance as defined in the "Alabama Controlled Substances Act," or any amendments thereto; or

(2) Being a person confined in a detention facility, he intentionally and unlawfully makes, obtains or possesses any narcotic, dangerous drug, or controlled

substance as defined in chapter 2 of Title 20 of this Code.

(b) Promoting prison contraband in the second degree is a Class C felony.

§ 13A-10-38. PROMOTING PRISON CONTRABAND IN THE THIRD DEGREE.

(a) A person is guilty of promoting prison contraband in the third degree if:

(1) He intentionally and unlawfully introduces within a detention facility, or provides an inmate with, any contraband or thing which the actor knows or should know it is unlawful to introduce or for the inmate to possess; or

(2) Being a person confined in a detention facility, he intentionally and unlawfully makes, obtains or possesses any contraband.

(b) Promoting prison contraband in the third degree is a Class B misdemeanor.

APPENDIX "E"

RELEVANT ALABAMA RULES OF COURT

ALABAMA RULES OF CRIMINAL PROCEDURE (TEMPORARY)

RULE 17. PRE-TRIAL APPEALS BY THE STATE

(a) GENERALLY. An appeal may be taken by the state in a felony case to the court of criminal appeals from a pre-trial order of the circuit court (1) suppressing a confession or admission of other evidence, (2) dismissing an indictment, information, or complaint (or any part of an indictment, information, or complaint), or (3) quashing an arrest or search warrant. Such an appeal may be taken only if the district attorney certifies to the court of criminal appeals that the appeal is not brought for the purpose of delay and that the order, if not reversed on appeal, will be fatal to the prosecution of the charge;

(b) NOTICE OF APPEAL; TIME FOR TAKING PRE-TRIAL APPEAL. The notice of appeal shall be filed both with the clerk of the circuit court and with the clerk of the court of criminal appeals and shall be filed within seven (7) days after the order has been entered, but in any case before the defendant has been placed in jeopardy under established rules of law. The notice of appeal shall specify the charge or charges as to which, and the defendant or defendants as to whom, the appeal is taken. In a case in which multiple offenses or multiple defendants have been joined for trial, such specifications on appeal shall be jurisdictional.

* * * *

(h) EFFECT OF RULING IN PRE-TRIAL APPEAL. If the trial court's ruling is upheld following a pre-trial appeal taken pursuant to this rule, then that affirmance shall operate as a bar to any further prosecution of the defendant or defendants as to whom the appeal was taken for any crime involved in the charge or charges as to which the appeal was taken, unless the trial court shall find that the subsequent prosecution is primarily based upon significant new evidence not reasonably available to the state when the pre-trial appeal was taken.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of April, 1990, I did serve the requisite number of copies of the forgoing on the Attorney for Douglas Freeman, Respondent, by mailing the same to said Attorney, first class postage prepaid and addressed as follows:

Honorable Bob E. Allen
Attorney at Law
640 South McDonough Street
Montgomery, Alabama 36104

_____
JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:
Office of the Attorney General
Alabama State House
11 North Union Street
Montgomery, Alabama 36130
(205) 242-7300

1957P

(2)

No. 89-1654

IN THE

Supreme Court Of The United States

October Term, 1989

STATE OF ALABAMA
Petitioner

vs.

DOUGLAS FREEMAN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF OF RESPONDENT IN OPPOSITION

JAMES M. FULLAN, JR., ESQUIRE
FULLAN & FULLAN
205 North 20th Street
Suite 610, Frank Nelson Building
Birmingham, Alabama 35203

Attorney for Respondent

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No. 89-1654

IN THE

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STATE OF ALABAMA
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vs.

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF OF RESPONDENT IN OPPOSITION

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, Douglas Freeman, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment in this case.

OPINION BELOW

Petitioner has duplicated matter on pages two and three of its Petition with respect to the opinion below. Aside from this, Respondent adopts Petitioner's state-

ment of the opinion below. We add that *no opinion* has been issued by an Alabama Appellate Court.

JURISDICTION

Respondent challenges jurisdiction under 28 U.S.C. § 1257(3).

REASONS WHY THE WRIT SHOULD BE DENIED

The Jurisdiction of this Court has not been properly invoked. Petitioner would have us believe that the basis of jurisdiction in this case is 28 U.S.C. § 1257(3). More particularly we suppose, that a title, right, privilege or immunity was specially set up or claimed under the Constitution of the United States and that Alabama Courts have misinterpreted the application of same.

This case concerns a suppression of evidence against Respondent. Respondent's Motion to Suppress is set out on pages seven and eight of the Petition with "emphasis supplied." We now reproduce the Motion with our own "emphasis supplied."

> "7. That the Constitutional rights guaranteed to the Defendant, *both* under the Constitution of the United States of America *and the Constitution of the State of Alabama, against unreasonable search and seizures have been violated.*" (R.p. 84; emphasis supplied)

Let us now look at the pertinent portions of the Alabama and United States Constitutions.

AMENDMENT FOUR, UNITED STATES CONSTITUTION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE ONE, § FIVE,
CONSTITUTION OF ALABAMA 1901

That the People shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrant shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

It cannot be gainsaid that there is not a dime's worth of difference between the two Constitutional provisions and that Alabama's provision is fully adequate to adjudicate the question below.

This Court has consistently held that it will not review a State Court judgment based on adequate nonfederal grounds and this be true even if a federal question was involved and perhaps wrongly decided. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

The reasoning behind this principle has been quite clearly stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judg-

> ments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

The principle is so deeply rooted that even where, after oral argument has been heard, an adequate state ground becomes evident the Writ of Certiorari will be dismissed. *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958).

Another principle to be considered is that where both federal and nonfederal questions are properly raised in the record, but no opinion is delivered by the highest state court in rendering its judgment, this Court ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which may be found adequate to support it. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Adams v. Russell*, 229 U.S. 353, 358 (1913); *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Phyle v. Duffy*, 334 U.S. 431 (1948); and see *Williams v. Kaiser*, 323 U.S. 471, 477 (1945).

If it be said that the nisi prius judgment and opinion somehow became the opinion and judgment of the Alabama Supreme Court and the Alabama Court of Criminal Appeals, we would agree that the nisi prius judgment became that of the Appellate Courts, but the opinion did not. Even if it be said that the nisi prius opinion was somehow flawed, it would not be the first time that an appellate court upheld a nisi prius court that rendered the right decision for the wrong reason. See a myriad of Alabama cases culminating at *Kaercher v. State*, 554 So.2d 1143 (Ala. Cr. App. 1989), *cert. denied*, 554 So.2d 1152 (Ala. 1989).

In any event:

> This Court, however, reviews judgments, not statements and opinions. . . . Moreover, even if

> the opinion be considered ambiguous, we should choose the interpretation which does not face us with a Constitutional question.

Black v. Cutter Laboratories, 351 U.S. 292, 297-299 (1956).

Where adequate state grounds are asserted, "*petitioner*, in order to establish our jurisdiction, *must demonstrate* that neither of these state grounds can account for the decision below." *Durley v. Mayo*, 351 U.S. 277, 281 (1956) (emphasis supplied).

Likewise, the jurisdictional burden is not met where the highest court of the state delivers no opinion and "it appears that the judgment *might* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

Interestingly enough the Petitioner itself, as Appellant below, agreed that state and federal grounds were before the Courts below at page ii of its initial brief to the Alabama Court of Criminal Appeals under Certificate of Service dated July 12, 1989, Petitioner listed in the table of Constitutional provisions there at bar *Alabama Constitution, 1901*, Article I, Section 5.

In the same brief at pages 10 and 11 Petitioner respectively opined:

> It is the need for security in facilities dedicated to the confinement of persons of criminal, often violent, propensity which makes such searches "reasonable" U.S. Constitution Amendment Four; *Alabama Constitution, 1901, Article I, Section 5.* (emphasis supplied)

> . . . His Honor suppressed this evidence, not because it violated the Fourth Amendment or *its sister provision of the State Constitution*, but because the search at issue here allegedly violated the Warden's memorandum. (emphasis supplied)

Again in its reply brief to the Alabama Court of Criminal Appeals under Certificate of Service dated August 8, 1989, Petitioner again listed the Alabama Constitutional provision at page ii of its brief.

In an application for rehearing under Certificate of Service dated October 6, 1989, we find at page ix "The Learned Trial Judge correctly found that the search of the Appellee was fully consistent with the *Constitutions of the United States and the State of Alabama*." (emphasis supplied)

In the same application for rehearing at page 10 we find "The Trial Court suppressed the evidence in this case on finding that although the search was in accordance with the Federal and *State Constitutions*, it violated the prison Warden's rule." (emphasis supplied)

In its Petition for a Writ of Certiorari filed in the Alabama Supreme Court under Certificate of Service dated November 22, 1989, we find the following at pages 1 and 3 respectively:

> The Circuit Court of Montgomery County in suppressing the evidence, expressly found that the search did *not* violate the Federal or *State Constitutions*. (emphasis supplied)
>
> Where a search is in conformity with the United States and *Alabama Constitutions* . . . (emphasis supplied)

In its Brief in support of the Petition under Certificate of Service dated November 22, 1989, we find that at page ii of the brief the *Alabama Constitution, 1901*, Article I, Section 5 is listed in the Table of Constitutional provisions at bar.

In the same brief at page 13, the *United States Constitution*, Amendment Four and *Alabama Constitution, 1901*, Article I, Section 5 is cited.

Alabama is hoist with its own petard. Curiously

enough it is passing strange that in its petition to this Court, Alabama's Article I, Section 5, disappeared from view.

We would not want to be misunderstood to say that if the shoe were on the other foot and the evidence was *not suppressed* in a dual federal-state ground situation, that a federal question would not be presented for review. A constriction of a federal right in a dual federal-state ground situation is not permissible. An extension in scope of a Federal Constitutional right perhaps not due to be granted by federal standards, nevertheless, would stand if it involved a similar State Constitutional right.

It is crystal clear that this case could have been decided pursuant to *Article I, Section 5 of the 1901 Constitution of Alabama*, even though the Fourth Amendment was involved. This Court has consistently refrained from reviewing cases where State and Federal grounds coexist, even though wrongly decided.

CONCLUSION

The Petition is due to be and ought to be dismissed instanter, out of hand, for failure to assert a federal question. Adequate nonfederal grounds were presented below which could sustain the judgment. Respondent prays that the Petition be dismissed and that he be allowed to go hence this day with his costs expended.

Respectfully submitted,

James M. Fullan, Jr.,
Attorney for Respondent

CERTIFICATE OF SERVICE

I, James M. Fullan, Jr., Attorney for Douglas Freeman, the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of June 26, 1990, I served three copies of the above and foregoing, Brief of Respondent in Opposition, on the Honorable Don Siegleman, Attorney General of the State of Alabama and the Honorable Joseph G. L. Marston, III, Assistant Attorney General of the State of Alabama, Attorneys for the Petitioner, by mailing in the United States mail a copy of same in a duly addressed envelope with first class postage prepaid to the Honorable Don Siegleman, Attorney General of the State of Alabama and the Honorable Joseph G. L. Marston, III, Assistant Attorney General of the State of Alabama at the Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130.

James M. Fullan, Jr.

James M. Fullan, Jr.,
Attorney for Respondent
FULLAN & FULLAN
205 North 20th Street
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Birmingham, Alabama 35203
Telephone: (205) 251-8596
Telecopier: (205) 251-8598

NO. 89-1654

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA

PETITIONER,

V.

DOUGLAS FREEMAN

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

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REPLY ARGUMENT

The Respondent, while taking no issue with the substantive points raised by the petition, argues that the petition should be denied, because the Respondent's motion to suppress in the Circuit Court of Montgomery County, Alabama, was based on both the United States Constitution, Amendment Four[1] and Alabama Constitution, Section five.[2] The Petitioner readily

---

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath of afffirmation."

acknowledges that, "...there is not a dimes worth of difference between the two Constitutional provisions...." (Respondent's Brief, page 3) But, the Respondent claims that the Alabama Courts might have decided this case under the State Constitution.

There are many arguments which could be advanced against the Respondent's position but we will advance only one, since it is the simpliest and is conclusive on this point: Regardless of what provisions the State Courts might have applied to this case, the only one they actually applied was Amendment Four to the Constitution of the United States.

The Trial Court's order cited the Fourth Amendment twice as grounds for its decision. (Appendix "A" to the Petition, pages 42-43) More conclusively, the Trial Judge did not

mention any other Constitutional provision, statute, court opinion, court rule, or legal text in support of his conclusion. His opinion and decision rested on the Fourth Amendment to the Constitution of the United States and no other authority. The Alabama Appellate Courts issued no opinions and therefore cited no authority at all.

There is no basis for a claim that the decision of the Alabama State Courts are based on anything except an indefensible interpretation of the Fourth Amendment.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, again respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of

Alabama, decided two questions under the Fourth Amendment in a manner which conflicts sharply with the teachings of this Honorable Court. In addition, this case presents important matters which this Honorable Court has never had the opportunity to address, but which this Court ought to address.

For these reasons, Your Petitioner again prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions of the said Courts of Alabama.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of ~~June~~, 1990, I did serve the requisite number of copies of the forgoing on the Attorneys for Douglas Freeman, Respondent, by mailing the same to said Attorneys, first class postage prepaid and addressed as follows:

Honorable Bob E. Allen
Attorney at Law
640 South McDonough Street
Montgomery, Alabama 36104

Honorable James M. Fullan, Jr.
Attorney at Law
205 North Twentieth Street
Suite 610, Frank Nelson Building
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:
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2157P